UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/1999/112
7 January 1999

ENGLISH
Original: ENGLISH/FRENCH

COMMISSION ON HUMAN RIGHTS
Fifty-fifth session
Item 10 of the provisional agenda

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

Note by the Secretariat

CONTENTS

		Page
I.	INTRODUCTION	2
II.	COMMENTS RECEIVED FROM STATES	2
III.	COMMENTS SUBMITTED BY NON-GOVERNMENTAL ORGANIZATIONS . . .	4

I. INTRODUCTION

1. In its resolution 1998/33 of 17 April 1998, entitled "Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights", the Commission on Human Rights requested the High Commissioner for Human Rights to urge all States parties to the International Covenant on Economic, Social and Cultural Rights to submit their comments on the report of the Committee on Economic, Social and Cultural Rights to the Commission on a draft optional protocol for the consideration of communications in relation to the Covenant (E/CN.4/1997/105, annex).

2. Pursuant to this decision, a request for comments was addressed on 17 August 1998 to Governments concerned.

3. By 15 December 1998, comments had been received from the following States: Croatia and Finland.

4. The comments had also been submitted, in response to the 1997 request, by the following non-governmental organization: Centre international de recherches et d'études sociologiques, pénales et pénitentiaires.

5. The present report contains a summary of the substantive replies received.

6. Any additional replies will be reproduced in an addendum to this document.

II. COMMENTS RECEIVED FROM STATES

Finland

[Original: ENGLISH]
[19 October 1998]

The Government of Finland sees the need to strengthen the global implementation of economic, social and cultural rights. Finland wishes to refer to its comments submitted last year in reply to the Secretary-General's letter of 27 August 1997, in which Finland welcomed the report of the Committee on Economic, Social and Cultural Rights on a draft optional protocol providing a system of communications in relation to the International Covenant on Economic, Social and Cultural Rights (E/CN.4/1997/105, annex) and stated that a communication procedure would be a means to ensure the recognition and implementation of the rights guaranteed in the Covenant.

Furthermore Finland would like to draw attention to the important step taken within the Council of Europe, i.e. the Additional Protocol to the European Social Charter Providing a System of Collective Complaints, which entered into force on 1 July 1998 and in respect of Finland on 1 September 1998. So far Finland has been the only State recognizing in accordance with Article 2 the right of any representative national

non-governmental organization within its jurisdiction, which has particular competence in the matters governed by the Charter, to lodge complaints against it.

Croatia

[Original: ENGLISH]
[12 November 1998]

The Republic of Croatia welcomes the idea of drafting an optional protocol to the International Covenant on Economic, Social and Cultural Rights in order to enable the individuals whose rights under the Covenant have been violated to submit an individual petition. The international supervision in the field of economic, social and cultural rights is of equal importance as the one which through different international mechanisms is available for the violations of civil and political rights. Despite the long discussion on the justiciability of economic and social rights, the Republic of Croatia shares the views of the Committee that, to a certain extent, economic and social rights are fully justiciable.

The Government however finds crucial for the Committee, in order to enforce the provisions of the future protocol in the appropriate manner, to develop a clear system of indicators with the purpose of defining the minimum in the scope of rights that has to be followed irrespectively of the economic prospects of the country involved.

In respect of the proposed provisions of the draft protocol, the Republic of Croatia wishes to propose several minor changes:

1. In the proposed text of the preamble the expression "subject of the economic, social and cultural rights" is proposed to be changed in a way to express that individuals are to enjoy rights. The division of object-subject of rights does not seem appropriate.

2. Considering the question of terminology, it seems clear that the right of an individual complaint coming under the protocol may affect just the violation of the individual right granted by the Covenant. Obligation of the State to submit reports is undoubtedly an international obligation, but failure to satisfy it does not represent the violation of any individual rights.

3. As the Committee accepted the concept that the individual or the group that submit complaint must be the victim of violation or acting on behalf and with the knowledge of the victim, the phrase "claiming to be a victim of violation" needs to be inserted already in the proposed article 1, after the word "groups".

4. The Government supports the comprehensive approach proposed by the Committee in section 2 of the report.

5. In the proposed text of Article 3, point 3 (b) introduces a provision that departs from the practice used by the Human Rights Committee. How is the Committee going to judge that the other international procedure is

unreasonably prolonged, knowing that, due to the objective circumstances, most of them take a long period of time? It could be understood as the intention, to suggest lack of objectivity or capability by the other international forum or even an attempt to introduce a kind of hierarchy between them. Anyway, in the interest of the legal safety, it is strongly suggested to reconsider this paragraph.

6. In the proposed text of Article 6, the Government finds unacceptable that the Committee bring "confidentially" to the attention of the State party any communication referred to it. It is unclear how the Government could address an anonymous application, when it relates to individual situation particularly in the case of the exhaustion of domestic remedies requirement. If this expression indicates that the Committee will not make the application public, the text should be redrafted to make it clear.

III. COMMENTS SUBMITTED BY NON-GOVERNMENTAL ORGANIZATIONS

International Centre for Sociological, Penal and Penitentiary Research and Studies at Messina. Comments by Professor Claudio Zanghì (Italy)

[Original: FRENCH]
[27 October 1998]

Preamble: I share the general opinion that a brief preamble, limited to the basics, should be formulated. In that light, I wonder if it would not be appropriate to merge the fourth paragraph "Recalling ..." and the fifth, "Noting ..." ((d) and (e)). The reference in (d) to the undertaking made by States does not really add much to what is already contained in the Covenant itself. By contrast, the word "Noting" in (e) reflects a necessary condition: practical and effective protection of human rights cannot be achieved without providing individuals claiming to be victims of violations with the power of direct action.

I therefore suggest merging the two paragraphs so as to show that the right we are proposing to recognize to individuals in (e) is no more than a logical and consistent consequence of the undertaking made by States and referred to in (d).

Article 1: No comments.

Article 2: No comments on the first part of the sentence in paragraph 1: it is appropriate to stipulate the economic, social and cultural rights recognized in the Covenant in order to avoid the possibility of the provision being interpreted as encompassing the other articles of the Covenant. I fully endorse the comprehensive approach relating to all the rights recognized, rather than the "à la carte" approach, whereby States could commit themselves only in respect of certain rights.

The second part of the sentence raises serious difficulties, however. To speak of an individual or group "... acting on behalf of such claimant(s) ..." entails by definition referring to a nexus between the person or group submitting the complaint and the person claiming to be the victim of a violation.

I do not think the qualification "acting on behalf of the claimant" is acceptable, if we do not at the same time specify the conditions under which a person may be considered to be acting on behalf of an alleged victim.

The reasons given in the analysis are less than convincing and at times even inadmissible, as when it is deemed enough for the person submitting the complaint to simply inform, or receive some kind of authorization from, the alleged victim.

To be applicable in practice, such a provision should deal directly with the problem or refer to the domestic legal system of the State in question. The first solution is impossible, while the second may itself be a factor in the interpretation of any provision that did not explicitly deal with the problem.

All in all, having regard to the precedents set by other texts, I believe it is preferable to restrict the text to the actual individuals or groups who claim to be the victims of violations.

In particular, in well-defined cases, such as where an individual or group is not physically capable of submitting a complaint (for example, if the individual has died), a complaint submitted by one individual on behalf of another may be deemed admissible under the Committee's case law, even if the situation is not explicitly covered by the article.

An intermediate solution might be to restrict the third-party option to specific cases. The only case which, in my opinion, presents no problems of admissibility is where the victim of a violation is physically incapable of taking action.

The article would therefore have to include the additional phrase "... where the claimant is physically incapable of lodging a complaint".

No comments on paragraph 2.

Article 3: On admissibility, no comments with regard to paragraphs 1 and 2. However, paragraph 3 raises a number of problems. First I note that there is no indication of time limits. Even given a precedent in this area, I feel it would be very difficult for States to allow themselves to be subject to a procedure that includes no time limit with regard to the events giving rise to the complaint. I suggest that a time limit after all domestic remedies have been exhausted should be imposed on the exercise of the right to submit a complaint to the Committee.

The second sentence in (b) raises more important questions. The intention of the provision "The Committee may ..." is to allow the Committee to examine a communication despite the fact that an international procedure may already be in progress. To my mind this is unacceptable in principle since it runs counter to internationally recognized principles of procedure, but it is rendered even more unacceptable since the phrase "... is unreasonably prolonged" gives the Committee unlimited discretionary powers. I therefore suggest that the sentence should be deleted.

Article 4: The idea expressed in paragraph 1 is in my opinion implicit in the activity of any body required to take a position on a complaint, a communication or an appeal. It goes without saying that, if the grounds are deemed insufficient, the case must be dismissed for lack of substantiation. There is no reason why the case should not be reopened at a later date if convincing evidence based on new facts is submitted.

I therefore believe that paragraph 1 serves no purpose, since it is not a question of declining to continue the examination but simply of dismissing the claim.

Paragraph 2, on the other hand, may be retained.

Article 5: No comments.

Article 6: No comments.

Article 7: Paragraph 1 raises problems in the light of my comments on article 2. For the sake of consistency, I suggest deleting the phrase "or on behalf of" in the first sentence of paragraph 1. I also suggest deleting the phrase "in accordance with paragraph 2". There are two disadvantages to this reference: first, since paragraph 2 has the sense of giving the Committee a choice rather than imposing an obligation (The Committee "may adopt" and not "shall adopt"), there is a possibility that the reference will be left hanging if the Committee does not adopt those procedures. As a result, the Committee would not be able to examine any procedure under paragraph 1 until it had adopted the procedures mentioned in paragraph 2. This would amount to compelling rather than allowing the Committee to adopt the procedures.

Second, even if the Committee had every intention of adopting the procedures, it would require a certain amount of time to do so; this would be tantamount to refusing to give practical implementation to the right to submit a communication.

I therefore suggest deleting this reference to paragraph 2 so as not to place greater constraints on the right to submit a communication and the possibilities of examining it.

With regard to paragraph 2 itself, it could be argued that it is implicit in the operation of any body that it may adopt such procedures as it deems necessary. Clearly, in that case, the whole of paragraph 2 could be deleted.

If, however, it is thought preferable to make this explicit, I would have no objection provided that no link was made between paragraph 1 and paragraph 2.

No comments on the remaining paragraphs.

Article 8: With regard to paragraph 2, I do not agree with the idea of giving the Committee the discretion to specify a longer period than the six months provided for. In the first place, six months is generally an acceptable period and the obligation is for the State to provide details of the measures

taken. In exceptional cases, for example where the measures recommended by the Committee require more than six months, there is nothing to stop States from providing details within the time allowed (six months), even if they have not yet fully implemented the measures recommended by the Committee.

In such a special case, further information should be provided later by the same State. In my view, such situations are exceptional and can be resolved by the Committee with no difficulty in the normal way, and without the need for provisions in the text of the article itself.

Article 9: No comments.

Article 10: Since rules of procedures are essential to the smooth running of the Committee, I believe it is simpler to say "the Committee shall make rules ...".

Article 11: No comments.

Remaining articles: No comments.

- - - - -